United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1909.

No. 2009. 588

FREDERICK H. VOGT, APPELLANT,

vs.

CHARLES GRAFF, FREDERICK C. GIESEKING, AND MATILDA S. VOGT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED APRIL 16, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1909.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 20, 1909.

In the Court of Appeals of the District of Columbia.

No. 2009.

FREDERICK H. VOGT, Appellant,
vs.
CHARLES GRAFF ET AL.

a Supreme Court of the District of Columbia.

No. 23547. In Equity.

SOPHIA VOGT, FREDERICK H. VOGT, OSCAR G. VOGT, CLIFFORD F. VOGT, BERTHA VOGT BRAND, LEO J. VOGT, Complainants,
vs.
CHARLES GRAFF, FREDERICK C. GIESEKING, and MATILDA S. VOGT, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill to Construe Will, etc.*

Filed Oct. 3, 1902.

In the Supreme Court of the District of Columbia.

No. 23547, Equity Doc. 53.

SOPHIA VOGT, FREDERICK H. VOGT, OSCAR G. VOGT, CLIFFORD F. VOGT, BERTHA VOGT BRAND, LEO J. VOGT
vs.
CHARLES GRAFF, FREDERICK C. GIESEKING, and MATILDA S. VOGT.

To the honorable the justice- of said court:

The bill of complaint of the above named complainants respectfully shows:

1. That they are all citizens of the United States and all residents

of the District of Columbia, that all of said complainants are adults over the age of twenty one years; that they bring this suit in their own several rights as will more fully hereinafter appear and that the complainants Sophia Vogt and Oscar G. Vogt also join in this proceeding as the trustees under a certain deed in trust from the complainant Leo J. Vogt, which conveyance will be more fully hereinafter recited.

2. That the defendants are also all citizens of the United States and residents of said District; that the defendant Matilda S. Vogt is an infant under the age of twenty one years and will be as complainants are informed and believe and consequently aver thirteen years of age on the 12th day of October, A. D., 1902; that the defendants, Graff and Kieseking are sued as the executors and trustees of the estate under the last will and testament of one John L. Vogt deceased, as will more fully hereinafter appear and that the defendant Matilda S. Vogt is sued in her own right as the sole heir apparent of the complainant Frederick H. Vogt as said matter will more fully hereinafter be made to appear.

3. That on or about the 8th day of August, A. D., 1894, one John L. Vogt, late a citizen of the United States, resident in said District, departed this life therein, testate, leaving him surviving, the complainant, Sophia Vogt his widow, and the other complainants herein, as his only children and heirs at law.

4. That said deceased died possessed of personal estate of considerable value, but the full extent, nature and value thereof is not now fully known to these complainants and that at the time of his death said deceased was seized, in fee simple, of the following described real estate, situate, lying and being in the city of Washington, in the District of Columbia, viz:

(*a.*) Lot numbered thirteen (13) in John Davidson's Heirs' subdivision in square numbered two hundred and eighty seven (287) as per plat duly recorded among the records of the surveyor's office of said District in Book N. K. pages 84 & 85, which lot is improved by premises known as No. 806 12th St., north west, the same being a three story and cellar brick building, with a two story brick stable in the rear thereof and which lot and improvements are assessed in the current tax records of said District as of the value of eighty four hundred and fifty ($8450.00) dollars and are said to be under rental at the rate of seventy dollars ($70.00) per month.

(*b.*) Part of lot numbered four (4) in square numbered three hundred and sixty nine (369) described as follows: Beginning for the same on L street at the south east corner of said lot and running thence west on said street twenty (20) feet, thence north one hundred and twenty (120) feet, thence east twenty (20) feet and thence south one hundred and twenty (120) feet to the place of beginning, which lot is improved by premises No. 923 L street north west, the same being a two story and attic frame building with a two story brick stable in the rear thereof and which lot and improvements are assessed in said current tax records as of the value of thirty two
2 hundred and forty dollars ($3240.00) and are said to be under rental at the rate of thirty (30) dollars per month.

(*c.*) Parts of lots numbered two (2) and ten (10) in square number three hundred and seventy nine (379) described as follows: Beginning for said part of lot two (2) at a point on Pennsylvania avenue distant one hundred and forty eight (148) feet, nine (9) inches west of the south east corner of said square and running thence west on said avenue fourteen (14) feet, nine (9) inches to the south west corner of said lot two (2) thence northerly on the west line of said lot and at right angles to said avenue seventy two (72) feet, nine (9) inches, thence east on the rear line of said lot two (2) to a point that will be intersected by a line drawn northerly at right angles to said avenue from the beginning and thence from said point southerly in a straight line to the place of beginning.

And beginning for said part of lot ten (10) at a point in the dividing line between lots (9) nine and ten (10) distant twenty (20) feet south of the north west corner of said lot ten (10) and running thence south sixty (60) feet, thence east sixteen (16) feet to a fourteen (14) feet wide alley, thence north on said alley sixty (60) feet and thence west sixteen (16) feet to the place of beginning, which lots are improved by premises No. 913 Pennsylvania avenue north west, the same being a three story and cellar brick store and dwelling and which lots and improvements are assessed in said tax records as of the value of fourteen thousand three hundred and ninety two dollars ($14,392.00) and are said to be under rental at the rate of one hundred and eighty dollars ($180.00) per month.

(*d.*) Two parts of lot numbered fifteen (15) in square numbered four hundred and thirty one (431) both pieces of said lot being described as one piece as follows: Beginning for the same at the north east corner of said lot and running thence south on Seventh street twenty two (22) feet, seven (7) inches, thence west one hundred (100) feet to a ten (10) feet wide public alley, thence north on said alley twenty two (22) feet, seven (7) inches and thence east one hundred (100) feet to the place of beginning which lots are improved by premises No. 426 7th street north west, the same being a four story and cellar brick store and which lots and improvements are assessed in said current tax records as of the value of twenty four thousand three hundred and thirty four dollars ($24,334.00) and are said to be under rental at the rate of two hundred and eight 33/100 dollars ($208.33) per month.

(*e.*) Lot numbered thirty two (32) in John L. Vogt's sub-division in square numbered four hundred and fifty six (456) as per plat duly recorded among the records of the surveyor's office of said District in Book 16 page 84, which lot is improved by premises No. 607 E street north west, the same being a four story and basement brick dwelling and which lot and improvements are assessed in said current tax records as of the value of eleven thousand one hundred and ninety four dollars ($11,194.00) and is not under rental being in the occupation of the complainant Sophia Vogt in accord-
3 ance with the terms of the will of said deceased as said matter will be more fully hereinafter recited.

(*f.*) Part of lot numbered six (6) in square numbered four hundred and fifty seven (457) described as follows: Beginning for the

same at the north west corner of said lot six (6) fronting on a thirty (30) feet wide public alley and running thence east thirty four (34) feet ten and a half (10½) inches, thence south eighty one (81) feet, ten and a half (10½) inches to a six (6) feet wide alley, thence west thirty four (34) feet, ten and a half (10½) inches to a twenty five (25) feet wide public alley and thence north eighty one (81) feet, ten and a half (10½) inches to the place of beginning which lot is improved by premises in the rear of Nos. 631 and 633 D street north west, the same being a two story and brick wagon shed and stable and which lot and improvements are assessed in said current tax record as of the value of forty two hundred and forty nine dollars ($4249.00) the same being under rental in connection with other premises owned by said deceased and hereinafter mentioned.

(*g.*) The north thirty (30) feet front on 7th street by the full depth of original lot numbered twelve (12) in square numbered four hundred and fifty seven (457) which lot is improved by premises Nos. 427 and 429 7th street north west the same being a three story and cellar brick building with a two story brick building in the rear thereof and which lot and improvements are assessed in said current tax records as of the value of twenty five thousand two hundred eighty for ($25,284.00) dollars and is said to be under rental at the rate of one hundred twenty five dollars ($125.00) per month.

(*h.*) Part of lot numbered sixteen (16) in square numbered four hundred fifty seven (457) which lot is improved by premises No. 620 E street north west, the same being a three story and basement brick store and dwelling and which lot and improvements are assessed in said current tax records as of the value of twelve thousand three hundred sixty six dollars ($12,366.00) and are under rental with other premises owned by said deceased and hereinafter mentioned.

(*i.*) Part of said lot numbered sixteen (16) in said square numbered four hundred and fifty seven (457) which lot is improved by premises No. 622 E street north west, the same being a three story and basement brick store and dwelling and which lot and improvements are assessed in the said current tax record as of the value of thirteen thousand six hundred and sixty eight dollars ($13,668.00) and it is said are under rental in connection with other property owned by said deceased and hereinafter mentioned.

(*j.*) Part of said lot numbered sixteen (16) in said square numbered four hundred and fifty seven (457), the said three (3) parts of said lot sixteen (16) being described as one part of said lot as follows, viz: All of lot numbered sixteen (16) in square numbered four hundred and fifty seven (457) except the east eleven and one half (11½) inches front on E street by the full depth of said lot which lot is improved by premises known as the rear of Nos. 620 & 622 E street north west, the same being a two story brick bakery and which lot and improvements are assessed in said current tax records as of the value of three thousand five hundred ninety nine dollars ($3,599.00) and it is said are under rental jointly with those parcels identified herein as *"f," "h"* & *"i"* at the rate of three hundred dollars ($300.00) per month.

(*k.*) All of lot lettered "N" in G. Bailey's sub-division in square numbered five hundred seventy (570)) as per plat in Liber B, folio 81 of the records of the surveyor's office of said District, except the south three (3) inches front on Third street by the full depth of said lot, which lot is improved by premises No. 419 3d street north west, the same being a three story brick dwelling and which lot and improvements are assessed in said current tax records as of the value of six thousand three hundred and eight dollars ($6308.00) and is said to be under rental at the rate of fifty 63/100 dollars ($50.63) per month and that the total assessed value of all the real estate of which said deceased died seized is one hundred twenty seven thousand eighty four dollars ($127,084.00) and the rent income therefrom is alleged by the defendants Graff and Gieseking to be eleven thousand five hundred sixty seven 52/100 dollars ($11,567.52) per annum.

5. That said deceased left a last will and testament dated the 7th day of March, A. D., 1894, which paper was thereafter to-wit on the 13th day of September, A. D., 1894, by this honorable court holding a special term for orphans' court business duly admitted to probate and record, the effect of which however was only to admit same as a will of personal estate, and at the same time letters testamentary upon the estate of said deceased were granted to the defendants Graff and Gieseking the executors nominated by said will, who thereafter qualified as such and have been since and are still acting in that capacity and that thereafter towit: on the 3d day of July, A. D., 1900 the said court admitted said will to probate and record as a will of real and personal estate as all of said matters will more fully appear on reference had to the record and proceedings in administration case No. 6284 on file in the office of the register of wills of said District, which record and proceedings these complainants will beg leave to produce and read as part hereof at any hearing of this cause and these complainants file herewith; and as part hereof a certified copy of the will of said deceased which is marked "Complainants' Exhibit No. 1" and which it is prayed may be read as part hereof at any hearing of this proceeding.

6. That as will appear from said will said testator appointed or attempted to appoint the defendants Graff and Gieseking (and said defendants claim he did appoint them) trustees of his real estate and defined or attempted to define their powers and duties and the limitations of said powers and duties.

7. That since the death of said testator the real estate of which he died seized has remained intact except that the complain-
5 ant Leo J. Vogt, on or about the 16th day of September, A. D., 1902 by his deed of trust recorded among the land records of said District on the 19th day of September, A. D., 1902, conveyed all his undivided interest in and to the several parcels of real estate, whereof the late John L. Vogt, of said District, died seized and possessed, and in and to all the undivided and undistributed estate of said decedent to Horatio N. Taplin and Thomas J. Deavitt to secure the payment to the "Capital Savings Bank and Trust Co., of Montpelier, Vermont" of his note for six thousand

dollars ($6,000.00) payable in three (3) years, with interest at the rate of six (6) per centum per annum payable semi-annually and except that the said complainant Leo J. Vogt, on or about the same day, by his deed in trust, recorded among the land records on the said 19th day of September, A. D., 1902 conveyed subject to said deed of trust all his interest in said estate to the complainants Sophia Vogt and Oscar G. Vogt as trustees upon the following trusts: "The said parties hereto of the second part are to have the absolute title, charge and control of the right, title, interest and estate of said party hereto of the first part, in or to the property hereinbefore described, or the proceeds thereof, if sold, to collect all rents and other incomes arising in or growing out of said property or the proceeds thereof, or to do every act and thing necessary for its care and preservation; the net proceeds derived from such property after the payment of all taxes, repairs and other necessary charges and expenses arising in or growing out of the care, preservation and protection of the same, shall be set aside and turned over monthly to said party hereto of the first part, the said Leo J. Vogt, during his life time for his sole and absolute use and benefit. The said parties of the second part or the survivor shall have authority to sell or dispose of the interest of said party hereto of the first part in any or all of said property and to convey in fee simple absolute or to encumber by way of mortgage or deed of trust without obligation on the part of the purchaser or person lending money to see to the application of the purchase money or money lent, when in their judgment it is deemed to be the best interest of the estate, in which event the net proceeds of such sale or sales *is* to be invested for the benefit of the said party hereto of the first part, the income thereof to be paid to said party hereto of the first part as hereinbefore described. And whenever in the judgment of the said parties hereto of the second part it is to the interest of said party hereto of the first part that he should have any or all of his estate or interest in the property heretofore described or the proceeds derived therefrom, then said parties hereto of the second part are authorized and empowered to convey to the said party hereto of the first part such interest or interests as the said parties hereto of the second part shall deem proper. And upon the death of the said party hereto of the first part, his interest in the aforesaid property shall be disposed of and the proceeds thereof paid to his heirs, executors or assigns, as he may by will direct and in default of such direction or disposition by will, the proceeds shall be paid to his heirs at law" and except that all the said children and heirs at law of said deceased, the complainants Sophia Vogt and Oscar G. Vogt joining therein as trustees under said last mentioned deed in trust on the 29th day of September, A. D., 1902, by their deed in fee simple recorded on the 30th day of September, A. D., 1902, conveyed all their interests in and to said sub-lot numbered thirty two (32) in square numbered four hundred fifty six (456) and part of lot numbered twelve (12) in square numbered four hundred and fifty seven (457) as said parcels of land are more fully hereinbefore described to the complainant Sophia Vogt.

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8. That it is the desire of the complainants, who are the only children and heirs at law of said deceased and except as to the land specifically devised to the complainant Sophia Vogt and as aforesaid conveyed to her by her said co-complainants, the only beneficiaries under the will of said testator so far as said real estate is concerned, that said real estate continue to be held intact and that it be not sold and to this end the said children and heirs at law of said deceased elect to take said real estate instead of their *pro rata* parts of the proceeds of any sale which said defendants Graff and Gieseking may wish or attempt to make thereof and these complainants do here protest against said defendants attempting to make any sale of said real estate, as they have threatened and were and are preparing to do.

And these complainants further say that it is against their best interests to sell said real estate inasmuch as the income from the part thereof coming to them now pays about ten per cent. upon the assessed value of said property and the proceeds of any sale thereof, if invested would be unlikely to produce a greater income than from four to five per cent.

9. That many questions have arisen concerning the construction of the will of said deceased and respecting the powers and duties of the defendants Graff and Gieseking as executors and trustees under same and as well concerning the nature and quality of the estate said defendants hold in the real estate of said deceased and whether in fact they hold any estate whatsoever therein, and as to their rights to force a sale of said real estate despite the protests and against the objections of the complainant-, children and heirs at law of said deceased and also regarding the commissions claimed by said defendants and as to the nature of the estates of certain of the devisees of said decedent in said real estate and other matters which are uncertain and equivocal in expression and intent and which require the construction of this honorable court and should be by it adjudicated and determined.

10. That said testator in the first, second, third, fourth, fifth and sixth paragraph- of said will provided for the payment of the indebtedness of the testator, the settlement of fiduciary matters, the purchase of a burial site and monument and the bequest of various sums of money to divers concerns and persons and the sev-
7 enth paragraph contains a bequest of all the testator's personal estate in his house at 607 E street, north west except stocks and bonds, to his wife the complainant Sophia Vogt and provides that she shall also have possesson of said home free from rent, taxes, insurance and repairs, and the eighth paragraph thereof bequeaths the rest and remainder or residue of the testator's personal estate equally between his wife and children and provides that the shares therein of his minor children shall be invested by his wife for the sole use and benefit of said minor children who is to act as their guardian without bond and that the ninth paragraph of said will provides that until his youngest surviving child shall attain the age of twenty one years, his executors are to pay out of the residue of the income from his real estate the sum of three hundred and fifty

dollars ($350.00) monthly to his wife and fifty dollars ($50.00) monthly to his grand-daughter, Mathilda S. Vogt subject to certain terms and conditions, and the balance to be divided among his children and the shares thereof coming to his minor children to be paid to his wife for the maintenance and education of the said children and for which she need not render any account.

That these complainants are not advised whether the payment of the testator's debts, personal and fiduciary, and the money bequests mentioned in the first to the seventh paragraph of said will are to be paid out of the personal estate of said deceased, whether in case of an insufficiency of personal estate they are to be paid *pro rat*e or in the order in which they are made, so far as said personal estate will extend, or whether in the event of a deficiency of personal estate to pay the same in full, whether said legacies are to be considered as creating liens upon the real estate of said deceased; that these complainants are also not advised as to whether the disposition of said residue of said testator's personal estate as mentioned in the eighth paragraph of said will is intended to mean, such personal estate as remains after the satisfaction of the testator's debts and money legacies and the bequest to the testator's wife mentioned in the seventh paragraph of said will, or whether the bequest of such residue of said personal estate applies only to and is to be read solely in connection with the aforesaid seventh paragraph; that these complainants are also not advised whether the use in the ninth paragraph of said will of the words "out of the residue of the income from my real estate to pay" is intended to apply or confine the payment of debts and legacies to the income from said real estate, or whether it has some other meaning, or whether it is mere surplusage and without any particular meaning or signification; that these complainants are also not advised of the meaning in the fifth paragraph of the use of the words "The said sum shall be set aside by my executors upon the qualification" and whether the word "qualification" is to apply to some condition upon the happening of which said legacy is to vest or to be paid, or whether it is intended to relate to the qual-
8 ification of the executors by their giving bond and taking the oath of office and that the complainants are also not advised, nor does said will express upon what condition of affairs said executors shall exercise a discretion in not paying the income of the legacy mentioned in the fifth paragraph of said will to Pauline Vogt, who has not however remarried, in the event that she remarries and complainants are consequently in doubt whether said executors have or that said testator intended them to have an arbitrary discretion in the event of the remarriage of said Pauline Vogt to pay or not to pay said income, and no matter what the reason to her and that said complainants are also not advised of the intention of the testator or the meaning in the ninth paragraph of said will of the use of the words "2nd to my grand-child Matilda Sophia Vogt, the sum of fifty dollars ($50.00) monthly in the same manner and under the like conditions as the specific legacy to her in paragraph heretofore numbered five (5)" and whether the whole of said paragraph five is to apply to said bequest or only a part of said paragraph and if a part

thereof, which part. Being in doubt and unadvised as to all of said matters hereinbefore detailed these complainants request that this honorable court, if it shall after the coming in of the answers of the defendants Graff and Gieseking be deemed necessary to do so, construe, adjudicate and determine same according to law, so that justice to all concerned may be done and the intentions of the testator in the premises may be fully carried into effect.

That concerning the debts of said deceased and said legacies these complainants are informed and believe it is the fact that said defendants Graff and Gieseking construed said will to mean that same should be paid out of the testator's personal estate and that said estate being sufficient for the purpose that they have fully paid said debts and legacies, but inasmuch as there has been no final accounting of said matter and no final distribution of the remainder of said personal estate among the persons entitled thereto complainants ask, without in any manner intending to reflect on the probity or faithful conduct of said defendants Graff and Gieseking, which these complainants do not do and are not to be understood as doing by the institution of these proceedings that the accounts of said defendants Graff and Gieseking as said executors and trustees be audited and settled by the auditor of this court.

11. That in and by the last clause of the seventh paragraph of said will the said testator stated, "She (meaning his wife) shall also have possession of said home, (meaning premises No. 607 E street, N. W., or sub lot thirty two (32) in square four hundred fifty six (456) free from rent, taxes, insurance and repairs" and in the tenth paragraph thereof the said testator provides "I give, devise and bequeath when my youngest surviving child shall have attained the age of 21 years, unto my wife Sophia lots 32 in square 456 and 12 in square 457 in the District of Columbia" and in the clause following said testator provides that "all the rest and residue of my real estate shall, when my youngest surviving child attains the age
9 of 21 years or one year thereafter in the discretion of my executors, be sold" etc. These complainants have no personal knowledge of the legal effect of said paragraphs, or whether the same did or did not vest a fee simple estate or title to said lots in the complainant, Sophia Vogt, but they are advised by counsel that such effect would probably be given to said devise by an equity court, yet that a title in fee simple would probably not be passed by any title company without a previous judicial construction thereof; that these complainants believing it was the intention of the said testator to vest his said wife, the complainant Sophia Vogt with a fee simple title to said lots executed to her as aforesaid the deed mentioned in paragraph seven hereof, but in this connection complainants are further advised by counsel that if this honorable court construes said will as only having passed or vested a life estate in said lots in said Sophia Vogt, the deed of the complainants to her will not be fully effective to vest her with a fee simple estate, should the court determine that the complainant Frederick H. Vogt is only seized of an equitable or legal life estate in his share of his father's estate, and in which

event he could not convey a fee simple title in said lots or his interest or remainder therein to the said Sophia Vogt.

Because of said conditions said complainants request that this honorable court construe, adjudicate and determine said matters.

12. That the residuary clause of said will reads as follows: "All the rest and residue of my real estate, shall when my youngest surviving child attains the age of 21 years or one year thereafter in the discretion of my executors, be sold by my executors at public auction, after due notice in the newspapers of this city. The proceeds of said sales shall be then divided among my heirs, share and share alike and paid over to them respectively at once, excepting the share coming to my son Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick Gieseking, as trustee-, by them invested, the income to be paid to his heirs after his death." That respecting the devise to the complainant Fred H. Vogt, these complainants are advised by counsel the legal effect thereof, is to vest the said complainant Frederick H. Vogt, who is usually called Fred H. Vogt with an estate in fee simple, but as said matter will be uncertain and open to question until a court of competent jurisdiction has passed thereon, these complainants request that this honorable court construe, adjudicate and determine said matter and if it be determined that said complainant Frederick H. Vogt is seized of an estate in fee simple that this court also determine whether his said interest in the estate of his said father vests directly in him or whether in the defendants Graff and Gieseking as trustees for his use. That in connection with said paragraph, these complainants further aver that the youngest surviving child of said testator viz: Clifford F. Vogt attained his majority on the 6th day of July, A. D., 1902; that the complainant Frederick H. Vogt is now unmarried, is about the age of thirty nine (39) years and that the defendant Matilda S. Vogt is his only child and heir apparent, and as such is made a party defendant to this proceeding.

That these complainants are advised by counsel that upon the death of said testator the estate held by him in the real estate hereinbefore described immediately vested in his children and heirs at law and that no estate legal or equitable vested in the defendants Graff and Gieseking as trustees or executors under the will of said testator; that the power of sale in said executors is a mere naked power and not mandatory in its nature; that any purchaser at any sale made by them would be obliged to see to the proper application of the purchase money realized at such sale; that the children and heirs at law of said deceased have the option and right of election whether to take said real estate or the proceeds of any sale thereof and which option or election they see fit to exercise by taking said real estate; that said defendants Graff and Gieseking are without power to advertise and sell said real estate or any part thereof in the face of the opposition and objections of said children and heirs thereto; that a sale of said property is against the best interests of the complainant-, children and heirs at law of said deceased who are the sole beneficiaries respecting said real estate under said will and if said sale is permitted said complainants will suffer great and

irreparable injury and loss and any attempt to make same should be prevented and enjoined by this honorable court, and these complainants submit all of said matters and objections for the construction, adjudication and determination of this honorable court.

13. That in and by the last paragraph of said will the testator provided "I hereby nominate, constitute and appoint Charles Graff and Frederick C. Gieseking executors of this my last will and testament hereby limiting the compensation of my executors to five per cent. (5%) jointly on my realty and personalty and to two and one half per cent. (2½%) jointly on the rent income." That in connection with said appointment of said defendants as executors of said will, these complainants are advised that said compensation was not intended by said testator as a gratuity or present to said executors and was intended solely as it is expressed in said clause as compensation for services to be rendered by them and its allowance was only made in the event that said executors should render the necessary services in making advantageous sales of said real estate and for distributing the proceeds of said sales among the heirs at law of said testator and said testator did not intend to contemplate that said compensation should be paid to said executors in the event that they made no sales of said real estate and did not distribute any proceeds of such sales among his children and heirs at law, nor did said testator intend or contemplate that said executors should receive the full sum of five per cent. (5%) even though they should make sale of said real estate, but only intended and contemplated that said percentage should be the maximum amount they could or
11 should receive for their services, nor did said testator intend or contemplate that said executors should receive such percentage for their management, care and rental of said property as is evidenced by his allowance to them of two and a half per cent. (2½%) upon the rent income, and these complainants submit all of said questions for construction, adjudication and determination, by this honorable court.

14. That there are, or other questions of doubt may arise or be suggested during the proceeding touching and concerning the construction of said will, all of which doubts complainants ask may be construed, interpreted, adjudicated and decided so that any further construction thereof may be avoided.

Wherefore the premises considered and complainants being without adequate remedy except in this honorable court and being in imminent danger of suffering great and irreparable injury and the exigencies of the situation complained of by them demanding the interposition and aid of the court; they pray.

1st. That Charles Graff, Frederick Gieseking and Matilda S. Vogt named in the caption of this bill as defendants may be made defendants hereto and that the writs of subpœna issue out of this honorable court, requiring said defendants to appear and answer this bill to the fullest of its exigencies.

2d. That a guardian *ad litem* be appointed by this honorable court, to appear for and answer this bill on behalf of Matilda S. Vogt, who is an infant as aforesaid.

3d. That the court construe, interpret, adjudicate and determine all the specific questions of construction set out herein concerning the will of said deceased or which may arise during the progress of said cause.

4th. That the court determine and decree the particular estates of said trustees and as well the respective heirs at laws of said deceased in and to the real estate mentioned in this bill.

5th. That the powers and duties of the defendant trustees and the limitations thereof be defined and decreed.

6th. That if it be determined that the devisees or heirs at law of said deceased have a vested estate in the real estate of said deceased that the decree be so made as to operate as a conveyance to them of said real estate fully divested of any claims of said defendant trustees, or that a trustee be appointed to make a proper conveyance of said real estate to the complainants according to their respective interests.

7th. That it be determined whether said trustees defendants hereto have the right to force a sale of said real estate against the wishes, objections and protests of these complainants and as well whether the complainants have an option or right of election to take said real estate or the proceeds of a sale thereof.

8th. That the court determine and decide all questions concerning what if any commission is due or payable to said defendant trustees for their services under the will of said deceased.

9th. That the court take and state all necessary accounts in
12 the premises and after so doing discharge said defendant trustees from further responsibility or duty in the premises.

10. That pending a final hearing of this cause, the full construction of said will and the final decision upon all matters properly in issue herein that said defendants Graff and Gieseking be enjoined and restrained from advertising or selling said property or from doing anything whatever to that end.

11th. And that the complainants may have such other and further relief as the nature of the case may seem to demand and to the court appear meet and proper.

SOPHIA VOGT.
BERTHA VOGT BRAND.
FREDERICK H. VOGT.
OSCAR G. VOGT.
LEO J. VOGT.
CLIFFORD F. VOGT.

ALEXANDER H. BELL,
Compl'ts' Sol'r.

DISTRICT OF COLUMBIA, *ss:*

We, Sophia Vogt, Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand and Leo J. Vogt on oath depose and say, that we have heard — the foregoing bill by us subscribed and know the contents thereof; that the facts stated therein upon our personal

knowledge *our* true, and those stated upon information and belief we believe to be true.

SOPHIA VOGT.
BERTHA VOGT BRAND.
FREDERICK H. VOGT.
OSCAR G. VOGT.
LEO J. VOGT.
CLIFFORD F. VOGT.

Subscribed and sworn to before me this 2nd day of October, A. D., 1902.

ELLIS HUGHES,
Notary Public, D. C.

[NOTARIAL SEAL.]

COMPLAINANTS' EXHIBIT No. 1.

Filed Oct. 3, 1902.

This is the last will and testament of me John L. Vogt, of the city of Washington District of Columbia, intending hereby to dispose of all property and estate real and personal, which I now own or may hereafter acquire, and to which I may be in any manner entitled at the time of my death, and hereby revoking all wills or codicils by me at any time heretofore made.

13 Paragraph 1. First. I direct my executors hereinafter named to purchase a lot in Rock Creek cemetery and a family monument, both to cost not more than three thousand dollars ($3000) and to be selected by my wife.

Paragraph 2. Second. After the payment of all my just debts (including all money held by me as treasurer of associations, as guardian, as administrator or any other funds held by me in trust—all of which are to be paid over immediately) and funeral expenses (including monument and lot above named), I give and bequeath to the trustees of the Concordia Lutheran church, of which I am a member, the sum of one thousand dollars ($1000)

Paragraph 3. Third. I give and bequeath to the trustees of the *the* J. L. V.

Page 2. German Orphan Asylum Association of the Dist. of Columbia the sum of one thousand dollars ($1000)

Paragraph 4. Fourth. I give and bequeath to Pauline Vogt, the wife of my son Fred, the sum of one thousand dollars ($1000)

Paragraph 5. Fifth. I give and bequeath to my grand-child Mathilda Sophia Vogt, the sum of two thousand dollars ($2000) to be paid to her when she is 21 years old. The said sum shall be set aside by my executors upon the qualification, and properly invested by them. The income so arising shall be paid to her mother Pauline Vogt, provided she does not re-marry. In such event, however, my executors may in their discretion, continue the payment of said income, or hold and invest the same for the benefit of my said grand child, until she attains the age of 21 years. In case of the death of

my grand child before she attains the said age, then said legacy shall be divided equally among my wife and children.

Paragraph 6. Sixth. I give and bequeath to my wife's cousin, Metta Warnke, at Burg near Bremen, Germany, the sum of five

J. L. V.

Page 3. hundred, ($500) dollars,

Paragraph 7. Seventh. I give and bequeath to my wife Sophia, all of my horses, carriages, buggies, sleigh, harness and robes, and all personal property in my house 607 E St. N. W. excepting stocks and bonds. She shall also have possession of said home, free from rent, taxes insurance and repairs.

Paragraph 8. Eighth. I give and bequeath all the rest and residue of my personal estate equally among wife Sophia and my children. The shares of my minor children shall be invested by my wife for the sole use and benefit of said minor children. My wife shall act as guardian for the minor children, without bond.

Paragraph 9. Ninth. Until my youngest surviving child shall have attained the age of 21 years, I direct my executors, out of the residue of the income from my real estate to pay, 1st to my wife Sophia the sum of three hundred and fifty dollars ($350) monthly; 2nd. to my grandchild Mathilda Sophia Vogt, the sum of fifty dollars ($50) monthly in the same manner and under the like

14 conditions as the specific legacy to her in paragraph heretofore numbered five (5); 3rd. the balance to be divided

J. L. V.

Page 4. equally among my children. The shares thus coming to my minor children shall be paid to my wife for the maintenance and education of the said children, and for which she need not render any account.

Paragraph 10. Tenth. I give, devise and bequeath, when my youngest surviving child shall have attained the age of 21 years, unto my wife Sophia lots 32 in square 456 and 12 in square 457, in the District of Columbia.

All the rest and residue of my real estate, shall, when my youngest surviving child attains the age of 21 years or one year thereafter in the discretion of my executors, be sold by my executors at public auction after due notice in the news papers of this city. The proceeds of said sales shall be then divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son, Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to his heirs after his death.

I hereby nominate, constitute and appoint Charles Graff and Frederick Gieseking executors of this my last will and testament, hereby limiting the compensation of my executors to five per cent. (5%) jointly on my realty and personalty. And to two and one half per cent. (2½%) jointly on the rent income. In testimony whereof I hereunto set my hand this 7th day of March A. D. 1894.

JOHN L. VOGT.

This page and the three preceding pages bearing initials J. L. V. were signed, published and declared by John L. Vogt to be his last will and testament this seventh day of March A. D. 1894 in the presence of us, who at his request, in his presence and in the presence of one another, have subscribed our names as witnesses thereto.

MYER COHEN.
WILLIAM HELMUS.
CHARLES A. SAUTLER.

DISTRICT OF COLUMBIA, *To wit:*

On the 6th day of September 1894, came Sophia Vogt and made oath on the Holy Evangels of Almighty God, that she does not know of any will or codicil of John L. Vogt, (except a will of an earlier date) late of said District, deceased, other than the aforegoing instrument of writing dated March 7th 1894 and that she found the same in the box belonging to the deceased at the Washing- Safe Deposit Co. and said John L. Vogt died on or about the 8th day of August 1894.

MRS. SOPHIA VOGT.

15 Sworn to and subscribed before me,

S. THOMPSON, JR.
Acting Register of Wills for the District of Columbia.

Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

SEPTEMBER 7*th*, 1894.

DISTRICT OF COLUMBIA, *To wit:*

This day appeared William Helmus, Charles A. Sautler and Myer Cohen the subscribing witnesses to the foregoing last will and testament of John L. Vogt, late of the District of Columbia, deceased, and severally made oath on the Holy Evangels of Almighty God, that they did see the testator therein named sign this will; that he published, pronounced, and declared the same to be his last will and testament; that at the time of so doing he was, to the best of their apprehension, of sound and disposing mind, and capable of executing a valid deed or contract; and that their names as witnesses to the aforesaid will were signed in the presence and at the request of testator and in the presence of one other.

Test:

L. P. WRIGHT,
Register of Wills.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

I, Levi P. Wright, register of wills for the District of Columbia, and *ex-officio* clerk of the said special term for orphans' court busi-

ness, do hereby certify that the foregoing is a true copy of the original will of John L. Vogt deceased, and the probate thereto, filed and recorded in the office of the register of wills for the District of Columbia aforesaid; and also that the said will after having been proven by the witnesses whose names appear in the foregoing probate, was, by order of the supreme court of the District of Columbia, holding a special term for orphans' court business, duly admitted to probate and record on the thirteenth day of September A. D. one thousand eight hundred and ninety-four.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said supreme court, special term for orphans' court business, this 30th day of October anno Domini 1894.

L. P. WRIGHT,

[SEAL.] *Register of Wills for the District of Columbia and Ex-officio Clerk of the said Special Term for Orphans' Court Business.*

16 *Answer of Matilda S. Vogt.*

Filed Jan. 27, 1903.

In the Supreme Court of the District of Columbia.

No. 23,547, Eq. Doc. 53.

SOPHIA VOGT ET AL.
vs.
CHARLES GRAFF ET AL.

Answer of the Defendant Matilda S. Vogt, by her Guardian, Pauline Vogt, to the Complainants' Bill.

This defendant being an infant under the age of twenty-one years, can neither admit nor deny the allegations contained in said bill, but submits her rights to the protection of this honorable court.

PAULINE VOGT,
Guardian of Matilda S. Vogt.

LEON TOBRINER,
Sol'r for Def't.

I, Pauline Vogt on my oath do depose and say that — have heard read the foregoing answer by me subscribed as guardian of said Matilda S. Vogt; that the facts therein stated from my personal knowledge are true and those set forth on information and belief, I believe to be true.

PAULINE VOGT.

Subscribed and sworn to before me this 27th day of January, A. D. 1903.

J. R. YOUNG, *Cl'k,*
By R. J. MEIGS, JR.

Replication.

Filed Feb. 4, 1903.

In the Supreme Court of the District of Columbia.

#23547. Equity.

SOPHIE VOGT ET AL.
vs.
CHARLES GRAFF ET AL.

The complainants join issue upon the answers of the defendants herein filed.

ALEXANDER H. BELL,
Compl'ts' Sol'r.

17

Opinion.

Filed Dec. 13, 1904.

In the Supreme Court of the District of Columbia. In Equity.

Equity. No. 23547.

SOPHIA VOGT ET AL.
vs.
CHARLES GRAFF ET AL.

The bill was filed in this case for the construction of the will of the late John L. Vogt, and for an accounting against the executors and trustees named therein. By prior orders and decrees of this court all matters in dispute between the parties have been determined, save the proper construction of the following clause of the will:

"All the rest and residue of my estate shall, when my youngest surviving child attains the age of twenty-one years or one year thereafter in the discretion of my executors, be sold by my executors at public auction after due notice in the newspapers of this city. The proceeds of said sale shall then be divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son Fred H. Vogt. Said share shall be paid to Charles Graff and Fred Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid his heirs after his death."

The controversy over this provision is between Fred H. Vogt, the son of the testator, and his infant daughter, Matilda S. Vogt, the former claiming that, by the application of the rule in Shelly's case, he takes an absolute estate on the principal under this paragraph, while on behalf of the infant it is contended that he takes only the

income of the property for life, the principal going to his daughter upon his decease.

The question has been very ably and fully argued before me by counsel for the respective parties.

Undoubtedly under the devise in this case there is an equitable conversion, and the property is to be treated as personal, not real. To quote the language of the supreme court in Cropley *vs.* Cooper, 19 Wall. 174: "Real estate having been directed by the will to be converted into money, it is to be regarded for all the purposes of the case, as if it were money at the time of the death of the testator. That it was not to be sold until after the termination of two successive life estates, does not affect the application of the principal. Equity regards substance and not form, and considers as done that which is required to be done. The sale being directed absolutely, the time is immaterial."

It must also be conceded that the rule in Shelly's case is
18 applicable, by analogy, to personal property, and to the same extent as to real property. Hughes *vs.* Nicklas, 70 Md. 484.

The relative weight of the rule and the intention of the testator, when they are in apparent conflict, is clearly indicated in the language of Mr. Justice Swayne, in Daniel *vs.* Whartenby, 17 Wall. 639, (quoted with approvel in De Vaughn *vs.* Hutchinson, 165 U. S. 566): "In considering it (the rule in Shelly's case, 1 Coke, 88) with reference to the present case a few cardinal principles, as well settled as the rule itself, must be kept in view. In construing wills, where the question of its application arises, the intention of the testator must be fully carried out, so far as it can be done consistently with the rules of law, but no farther. The meaning of this is, that if the testator has used technical language, which brings the case within the rule, a declaration, however positive, that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the rule and cannot affect the result. But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail."

In the present case, it does not seem to me to admit of doubt that so far as the technical language used by the testator is concerned, it is precisely the language which sets in operation the rule in Shelly's case, and that there are no such explanatory or qualifying expressions as modify the technical terms. The income of the property is limited to Fred H. Vogt for life and, after his death, the principal to his heirs, in simple and unmistakable terms. Uudoubtedly the testator's intention was exactly contrary to the effect of the technical language used, but there are no words used which qualify the estate created.

But it is contended on behalf of the infant that in order that the rule may apply, the estate of both the ancestor and heir must be of the same nature or quality, "either both legal or both equitable, and

not one legal and the other a trust estate;" and that the estate of Fred H. Vogt is equitable while that of the daughter is legal.

The rule is correctly stated; are the estates of different nature or quality?

To determine this question, we must ascertain what quality of estate Fred H. Vogt, and his heir or heirs, respectively took at the decease of the testator; not, as argued by counsel for the infant, what will be the estate of the heirs at the death of the person having the life-interest. It seems to me that this view of the two estate- or interest- dispels all doubt. "Said share shall be paid to Charles Graff and Fred Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to his heirs after his death." The trustees hold the legal title of the "share" from the death of the testator, to pay the income to Vogt and to hold the principal for his heirs, to be paid over on
19 Vogt's death. Surely Vogt's interest is equitable; can any other definition of the interest of the heirs *during Vogt's life* be given?

The precise question involved was decided by the supreme court of Illinois in the case of Glover *vs.* Condell, 163 Ill. 566. Quoting from page 588:

"But personal property is not within the statute of uses. In the case at bar, the trustees were to hold the proceeds of sale—the money or securities representing two-thirds of Albert's share—during his life and invest the same and pay him the interest during his life, so that the trust was an active one and his estate was equitable. At his death the principal of the share is to be paid to his heirs, and so, for the purpose of turning the share over to the heirs by payment, or delivery, or assignment of securities, the legal title at his death still remain- in the trustees, and *until such payment,* delivery or assignment the estate of the heirs was equitable. In such cases the legal title remains in the trustee 'until the purposes of the trust are accomplished, and until the possession of the property is in some way transferred to the person entitled to the use, or the last use.' (1 Perry on Trusts,—3d ed.—secs. 311, 303; Kirkland *v.* Cox, 94 Ill. 400.) If therefore, in this case the original devise to the trustees of the fund to be invested for Albert during his life and to be paid to his heirs at his death, considered separately from the gift over to the children of the testator be construed by the application thereto of the principles involved in Shelly's case, it cannot be said, that the prior estate given for life to Albert, and the *subsequent estate to go to his heirs* are not both of the same quality."

The case of Warner *et al vs.* Sprigg *et al.*, 62 Md. 14 is very like the case at bar. There a testator directed that his whole estate, real, personal and mixed, should be divided by three trustees into five equal parts, two of which should go to his daughter and the other three to his two sons. The three trustees were to hold in trust for his three children, according to their respective shares, permitting the children to receive the rents and income thereof The will then proceeded: "After the death of my said sons respectively, their shares to go to their several heirs-at-law." It was held that while as to the

real estate, the trust declared by said will (the same involving no powers or duties in the trustees,) was, by force of the statute of uses, executed in the children of the testator, who took thereby legal estates under the will. But it was also held as to the personal estate that the bequest carried the legal estate to the trustees and that, by analogy to the rule in Shelly's case, the clause giving their shares after their decease to their several "heirs at law," gave them the absolute equitable interest.

I am unable to see any distinction between the facts of that case and those in the case at bar.

It is further contended by counsel for the infant that not only is there a difference in the *quality* of the estates of her father
20 and herself, but that the bequest is of different *property,* the father getting the *income* of the fund, while the *fund* itself goes to the heir.

After careful study I have been unable to see any force in this contention. The language of the will is that "All the rest and residue of my estate * * * be sold * * * the proceeds of said sale shall be then divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the *share* coming to my son, Fred H. Vogt. *Said share* shall be paid to * * * as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid his heirs after his death." Surely this creates a trust of Fred H. Vogt's "share" for his use during his life. Assuming the remainder over was valid, can it be seriously contended that the *property* in which Vogt has an equitable interest for life is not the same property bequeathed absolutely to his heirs after his death?

For these reasons. I will sign a decree construing the will as bequeathing to Fred H. Vogt his share absolutely.

ASHLEY M. GOULD, *Justice.*

Decree Construing Will.

Filed Jan. 5, 1905.

In the Supreme Court of the District of Columbia.

Equity. No. 23547.

SOPHIA VOGT ET AL.
vs.
CHARLES GRAFF ET AL.

This cause came on to be heard upon the pleadings herein for the construction of the last will and testament of John L. Vogt, deceased, and having been fully argued by counsel for the respective parties in interest, and duly considered, it is thereupon by the court this fifth day of January, 1905, adjudged, ordered and decreed as follows, viz:

1st. That the testator, John L. Vogt, deceased, in the residuary clause of tenth paragraph of his last will converts the real estate therein devised to his heirs into personalty.

2nd. That the complainant, Frederick H. Vogt, takes a one-fifth interest in the residuary fund devised in the tenth paragraph of said will absolutely.

3rd. That it appearing to the court that all parties in interest except the infant defendant Mathilde Vogt, whom the court hereby decides has no interest, have decided to take the real estate instead of the proceeds of a sale thereof, it is hereby further adjudged, ordered and decreed that the trustees heretofore appointed by this court in the place and stead of the defendants, Graff and Gieseking, be and they hereby are discharged; and that the real estate devised under the tenth paragraph or residuary clause of said will be, and the same hereby is, vested in Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand and Leo J. Vogt, their heirs and assigns in fee simple as tenants in common. And from this decree the infant defendant Mathilde Vogt appeals to the Court of Appeals D. C. and the bond on such appeal is fixed at one hundred dollars for costs.

ASHLEY M. GOULD, *Justice.*

21 *Mandate.*

Filed December 31, 1906.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas, lately in the Supreme Court if the District of Columbia, before you, or some of you, in a cause between Sophia Vogt, Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand, Leo J. Vogt, complainants, and Charles Graff, Frederick C. Gieseking, and Matilda S. Vogt, defendants, Equity No. 23,547, wherein the decree of the said Supreme Court entered in said cause on the 5th day of January, A. D. 1905, is in the following words, viz:

"This cause came on to be heard upon the pleadings herein for the construction of the last will and testament of John L. Vogt, deceased, and having been fully argued by counsel for the respective parties in interest, and duly considered, it is thereupon by the court this fifth day of January 1905, adjudged, ordered and decreed as follows, viz:

1st. That the testator, John L. Vogt, deceased, in the residuary clause of tenth paragraph of his last will converts the real estate therein devised to his heirs into personalty.

22 2nd. That the complainant, Frederick H. Vogt takes a one-fifth interest in the residuary fund devised in the tenth paragraph of said will absolutely.

3rd. That it appearing to the court that all parties in interest except the infant defendant Mathilde Vogt, whom the court hereby decides has no interest, have decided to take the real estate instead of the proceeds of a sale thereof, it is hereby further adjudged, ordered and decreed that the trustees heretofore appointed by this court in the place and stead of the defendants, Graff and Gieseking, be and they hereby are discharged; and that the real estate devised under the tenth paragraph or residuary clause of said will be, and the same hereby is, vested in Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand and Leo J. Vogt, their heirs and assigns in fee simple as tenants in common. And from this decree the infant defendant Mathilde Vogt appeals to the Court of Appeals D. C. and the bond on such appeal is fixed at one hundred dollars for costs.

ASHLEY M. GOULD, *Justice.*"

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, aggre-ably to the Act of Congress in such case made and provided, fully and at
23 large appears taken by Mathilda S. Vogt, by her guardian *ad litem* Pauline Vogt, whereon Sophia Vogt, Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand, Leo J. Vogt, Charles Graff and Frederick C. Gieseking were made the parties appellees agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the terms of April, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby reversed with costs and that the said Matilda S. Vogt, by her guardian *ad litem* Pauline Vogt recover against the said Sophia Vogt, Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand, Leo J. Vogt, Charles Graff and Frederick C. Gieseking Forty three dollars and ten cents for her costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

JUNE 13, 1905.

And whereas, said cause was removed to the Supreme Court of the United States by virtue of an appeal taken by Frederick H. Vogt, agreeably to the Act of Congress in such case made and
24 provided:

And whereas at the October Term, A. D. 1906, of said Supreme Court of the United States the following decree was entered, viz:

"It is now here ordered, adjudged and decreed by this Court that

this appeal be, and the same is hereby, dismissed for the want of jurisdiction.

OCTOBER 19, 1906."

as by the inspection of the Mandate of the said Supreme Court of the United States fully and at large appears.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 31st day of December in the year of our Lord one thousand nine hundred and six.

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Costs of Matilda S. Vogt.

Clerk	$10.60
Attorney	5.00
Printing Record	27.50
	$43.10
Record	9.35

25 *Final Decree.*

Filed March 1, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 23547.

SOPHIA VOGT ET AL., Complainants,
vs.
CHARLES GRAFF ET AL., Defendants.

Upon presentation of the mandate of the Court of Appeals of the District of Columbia, filed herein on the 31st day of January, 1906, and upon consideration of the pleadings and former decrees herein, and it appearing therefrom that all the matters in controversy, with the exception of the construction of the residuary clause, or tenth paragraph, of the last will and testament of John L. Vogt, deceased, were adjudicated prior to the fifth day of January, 1905; and it further appearing from the record in the case that on the said 5th day of January, 1905, a final decree was entered in the cause construing said paragraph of said will, from which an appeal was duly entered by defendant, Matilda S. Vogt, by her guardian *ad litem,* Pauline Vogt, to the Court of Appeals of the District of Columbia; and there now being presented to this court the said mandate of the Court of Appeals of the District of Columbia, and upon consideration thereof, and after hearing counsel for the respective parties in inter-

est, it is by the court this 1st day of March, 1909, Adjudged,
26 Ordered and Decreed that the decree entered in this cause on the 5th day of January, 1905, be and the same hereby is vacated and set aside.

And in conformity with said mandate it is further Adjudged, Ordered and Decreed that in and by the tenth paragraph of the last will and testament of John L. Vogt, deceased, the complainant Frederick H. Vogt, takes only an equitable interest for life in and to the income to be derived from the proceeds of the real estate, which are thereby directed to be paid to Charles Graff and Frederick C. Gieseking, as trustee; and upon the death of the said Frederick H. Vogt, the principal of such proceeds is bequeathed to his children, or next of kin.

JOB BARNARD, *Justice.*

From this decree an appeal is taken by the complainant, Fred H. Vogt, in open court to the Court of Appeals, and bond for costs is hereby fixed at $100.

JOB BARNARD, *Justice.*

Order for Severance on Appeal.

Filed March 1, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 23547.

VOGT ET AL., Complainants,
vs.
GRAFF ET AL., Defendants.

It is by the court this 1st day of March, 1909, Ordered
27 that the complainant, Fred H. Vogt, be and hereby is, granted a severance from the other complainants herein on appeal from the decree passed herein on the 1st day of March, 1909.

JOB BARNARD, *Justice.*

Memorandum.

March 12, 1909.—Appeal bond filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed March 20, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 23547.

SOPHIA VOGT ET AL., Complainants,
vs.
CHARLES GRAFF ET AL., Defendants.

The Clerk of the Court will please prepare the record for the appeal herein taken by the complainant Frederick H. Vogt and include the following:

28 Bill filed October 3, 1902, Exhibit No. 1.
Answer of the defendant Matilda S. Vogt, filed January 27, 1903.
Opinion of Mr. Justice Gould, filed December 13, 1904.
Decree construing will, filed January 5, 1905.
Mandate of the Court of Appeals, filed ——.
Final Decree filed March 1st, 1909.
Order of severance, filed Mch 1, 1909.
Memorandum of bond, filed —— —, 1909.
Memorandum of this order.

JOHN C. GITTINGS,
Solicitor for Appellant, Frederick H. Vogt.

Leon Tobriner, Esq., Solicitor for Matilda S. Vogt.

SIR: The above is a designation of the papers deemed necessary for the proper determination of the case on appeal. If there are any additions that you desire made to the record will you kindly notify the Clerk within ten days.

JOHN C. GITTINGS,
Solicitor for Appellant, Frederick H. Vogt.

O. K.
LEON TOBRINER,
Sol'c't'r, G'd'n ad Litem.

29 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 23547 Equity, wherein Sophia Vogt, *et al.* are Complainants and Charles Graff, *et al.* are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 6th day of April A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 2009. Frederick H. Vogt, appellant, *vs.* Charles Graff *et al.* Court of Appeals, District of Columbia. Filed Apr. 16, 1909. Henry W. Hodges, clerk.